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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 681

ACME-EVANS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (4A. 247–257)[1] is reported in 130 F. (2d) 477. The findings of fact, conclusions of law, and order of the National Labor Relations Board (P. A. 771–839) are reported in 24 N. L. R. B. 71.

[1] For the convenience of the Court, the method of referring to the record adopted by petitioner is used throughout this brief. Thus, the appendix filed by the Board in the court below is referred to as "P. A.," and the four volumes of the appendix filed by the company in the lower court are referred to as "1A.," "2A.," "3A.," and "4A.", respectively. The proceedings in the court below have been included in 4A. 180–340. Unprinted portions of the record are referred to as "Tr."

JURISDICTION

The decree of the circuit court of appeals (4A. 333–336) was entered on December 7, 1942. The petition for a writ of certiorari was filed on January 29, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the Board and the court below erred in refusing petitioner leave to adduce certain evidence excluded by the trial examiner, and the court in excluding other additional evidence.

STATUTE INVOLVED

The pertinent provisions of the statute involved are set forth in the Appendix, *infra*.

STATEMENT

After appropriate proceedings, the National Labor Relations Board made findings of fact and conclusions of law and entered the order whose enforcement was decreed by the circuit court of appeals. It is conceded that the findings of fact are supported by substantial evidence in the record (Pet. 7). They may be summarized as follows:

In December 1938 International Brotherhood of Teamsters Chauffeurs, Stablemen and Helpers Local Union 135 (Local 135) and Federal Labor Union No. 21873 (Federal), both affiliated with

the American Federation of Labor, were organizing petitioner's employees (P. A. 781, 783, 820). Petitioner interfered with its employees' exercise of their right to join and assist a union by hostile questioning, by encouraging informers and spying on the employees, and by anti-union statements (P. A. 781–789).

Lowell Chastain was one of the early and active leaders in behalf of Federal (P. A. 781–782, 790). On December 16 petitioner became convinced of his interest in Federal and sought to recover a letter written the day before, praising Chastain's industry and ability (P. A. 790). He was isolated and was expressly ordered to refrain from union activity on company property; no such rule was at that time applicable to other employees (P. A. 791–792). Subsequently, one Rhodes, the petitioner's chemist, repeatedly visited Chastain in the plant and attempted to draw him into conversations concerning unions (P. A. 791). On January 5 Rhodes reported to petitioner that Chastain had solicited his membership and, on January 6, Chastain was discharged without first receiving an opportunity to answer the allegation, which, on the witness stand he denied and which (the Board found) was not true (P. A. 791–792).

When Chastain was discharged, he was given a letter by petitioner setting forth that he was discharged (a) because his position was being abolished, (b) for engaging in union activities on

petitioner's property, and (c) for disclosing confidential information concerning the number of petitioner's employees and their wage rates (P. A. 791). But these explanations were a pretense. The first reason, that Chastain's position was being abolished, was simply not true (P. A. 795). As for the second, before he was isolated Chastain did not break any company rule by soliciting members in the plant, and thereafter he obeyed the injunction. As for the third, even if petitioner did believe that Chastain had disclosed the information, the supposed offense was not the exclusive cause for the discharge; the other evidence showed that Chastain's union activity was the motivating cause (P. A. 793–794).

On January 9, 1939, petitioner also discharged Moneymaker and Nall for union activities. Both had been active in urging the only two non-union truck drivers, one of whom subsequently admitted to being a company "stool pigeon", to join the union (P. A. 783–784). On January 3, after learning of the petitioner's anti-union attitude, Moneymaker had remarked to the truck drivers in the garage that, if he lost his job because of the union, he knew two fellows who would go home in an ambulance; Nall agreed (P. A. 796). This occurrence was reported to petitioner, and Moneymaker and Nall were then discharged (P. A. 796–797). The reason given was that they had neg-

lected work, had engaged in personal activities at the plant and had threatened bodily harm to other employees (P. A. 797). It was plain, however, that it was the interest of Moneymaker and Nall in the union, and not any misconduct, which caused the discharge. Petitioner gave them no opportunity to present a defense and did not follow its practice of warning employees once before disciplining them for misconduct. Moreover, their foreman told several people that Moneymaker and Nall were discharged because they were "mixed up in" and "talked too much about unions" although they were two of the best workers he had had (P. A. 797–799).

As a result of these unfair labor practices, Federal and Local 135 called a strike (P. A. 800). Petitioner discriminated against twenty-two striking employees by discharging some and by refusing to reinstate others to their former positions (P. A. 802–817). Some of the men discharged or not reinstated were accused of violence during the strike (P. A. 808–809). Fist fights and verbal altercations did occur on the picket line and trucks leaving the plant were followed by strikers, but no one was seriously injured and petitioner's property was not damaged (P. A. 801–802, 808). Petitioner's investigation of these incidents was entirely one-sided so that responsibility for the violence was not fixed; it took affidavits and reports from non-striking employees but did not allow any

striking employees to tell their versions of what occurred (P. A. 809). Likewise, petitioner took no steps to discipline or restrain non-striking employees (P. A. 809). And those strikers who were discharged were, quite apart from the strike, the most active in the union (P. A. 810). For these reasons, there could be no doubt that petitioner discharged these men, like the others, for union activity (P. A. 807, 811).

On February 10 and 18, 1939, petitioner refused to negotiate with Local 135 for an agreement covering the truck drivers. The truck drivers were a unit appropriate for purposes of collective bargaining and on both dates a majority belonged to Local 135. At the hearing petitioner attempted to justify this refusal upon its doubt whether the unit was appropriate and whether there was a majority, but in fact it had no *bona fide* doubts. Petitioner also contended that it was not obliged to bargain because members of Local 135 were engaged in a conspiracy violating the Sherman Act and various state laws, and because Local 135 had a reputation, based on past incidents, for using violence in labor disputes. The Board overruled these defenses and concluded that the refusals to bargain were a violation of Section 8 (5) of the Act (P. A. 820–827).

At the same time that it made the foregoing findings of fact, the Board also ruled upon evidence excluded by the trial examiner, which was reoffered in a motion before the Board. This evi-

dence, the exclusion of which is assigned as error, falls, for the most part,[2] into three classes:

First. Petitioner offered and the trial examiner excluded evidence of oral and written reports made to its officials by other employees concerning the activities of Chastain,[3] and Moneymaker and Nall,[4] and concerning violence during the strike.[5] In most instances the witness was allowed to state that a report was made to him, but he was not allowed to give the contents of the report on the ground that it would be hearsay. This was done upon a showing of the availability as a witness of the person who made the report. In many instances, the witness in fact was called.

Where written reports or affidavits were offered, the board reversed the trial examiner and accepted them as evidence of what was before petitioner when it committed the allegedly unfair labor practices. Thus, the written reports alleged to have been part of the basis for the discriminatory

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[2] It is not possible to summarize briefly all the rulings on evidence to which petitioner refers. Most of them are trivial and were not seriously pressed in argument to the Board or in the circuit court of appeals. They are collected, although often with insufficient context, at 4A. 60–179. So far as feasible we shall discuss them in footnotes to the text.

[3] P. A. 409–415, 1A. 313–316, 379; R. Exh. 110 and 111, 124; 3A. 1460–1461, 1497–1498.

[4] P. A. 403–404, 407; R. Exh. 131 and 132; 3A. 1508–1511.

[5] P. A. 1A. 352–354, 359, 361, 362; R. Exh. 31–69, 106; 3A. 1381–1406, 1456.

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discharges of Chastain,[6] and Moneymaker and Nall,[7] were admitted, as were all the affidavits of violence during the strike.[8] But the Board did not require the hearings to be reopened to receive the oral testimony.

Second. Petitioner offered witnesses to state that Local 135 had a reputation in Indianapolis for using force and violence in labor disputes. In support of their testimony, it also offered only to show that a former officer and two former members of Local 135, none of whom was employed by petitioner, had, approximately four years prior to the unfair labor practices in this case, killed a non-striking employee of another company, as the result of which they were convicted of manslaughter, and the decedent's widow had recovered damages for wrongful death. The trial examiner excluded this evidence and the Board affirmed his ruling, pointing out that any past misconduct by Local 135, even if proved, would not be an excuse for petitioner's refusal to bargain when the union approached it in good faith. (1A. 10–11, 562–564, 570–571; 2A. 1079–1080, 1082–1083, 1084–1085, 1352–1353; R. Exh. 95, 119; 3A. 1449–1452, 1483–1489; P. A. 826.)

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[6] R. Exh. 110, 124; 3A. 1460, 1495–1496; P. A. 791, n. 16, 794, n. 19.

[7] R. Exh. 130; A. 1508; P. A. 796, n. 22.

[8] R. Exh. 31–69, 106; 3A. 1381–1406, 1456; P. A. 808.

Third. Petitioner offered to prove by the declarations of a few individuals during the joint meeting in which Federal and Local 135 voted to strike and by isolated statements of a few individuals upon other occasions that the striking employees conspired to restrain the movement of its interstate shipments, using violence if necessary, thus violating the Sherman Act and certain of the laws of Indiana.[9] The Board affirmed the ruling excluding this evidence on the ground that it would not undertake such collateral inquiries concerning violations of federal and state laws. The Board also held that, giving full weight to the offers of proof, they would show no more than that the employees agreed to strike in protest against the unfair discharges of Chastain, and Moneymaker and Nall, which, of course, was the employees' right (P. A. 829–830).

Fourth. In its exceptions to the trial examiner's report (P. A. 755–756), petitioner contended that it was denied a fair hearing (a) by the requirement that it submit a list of the names of witnesses for whom it wished subpoenas specifying the nature of the facts to be proved by them, whereas the Board's attorneys were not required to follow that practice and (b) by the denial of some of its applications for subpoenas. The Board held that petitioner

[9] The proffered evidence is gathered together (4A. 118–150).

had received a fair hearing and that it was not prejudiced by the refusal of subpoenas because the only subpoenas which were not issued were for witnesses who had previously been examined and cross-examined on all matters material to the issues in the case (P. A. 776).

On the basis of the foregoing findings of fact and rulings on evidence, the Board entered its order directing petitioner (a) to cease and desist from interfering with its employees' exercise of the right to form, join, and assist any labor organization (b) to reinstate, restore to their seniority and other rights and privileges, and make whole those employees against whom it had discriminated, (c) upon application to reinstate the other employees who went on strike, and (d) to bargain collectively with Local 135 (P. A. 835–839).

In the circuit court of appeals petitioner did not contend that the findings of the Board were not supported by substantial evidence or that the order was not warranted by the findings. It filed a petition for leave to adduce the evidence previously excluded by the trial examiner and the Board, contending that the trial examiner had been biased and unfair and that both he and the Board had denied petitioner a fair trial by their rulings on evidence. Some additional evidence was also sought to be adduced to show misconduct by other unions entirely unrelated to the case and by Teamster's unions in other industries subsequent to the

unfair labor practices involved in this case (4A. 194–196, 204–212). The circuit court of appeals denied the petition and entered a decree enforcing the order of the Board (4A. 333–336).[10]

In this Court petitioner's sole contention is that it should have been permitted to adduce the evidence referred to in its petition in the circuit court of appeals and in its petition for rehearing.

ARGUMENT

The ruling of the Board on the evidence offered by petitioner and the denial of its motion in the circuit court of appeals for leave to adduce the evidence raise no questions requiring decision by this Court. Since the evidence was properly excluded, no conflict exists between the instant case and *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 225–226, and *Donnelly Garment Co.* v. *National Labor Relations Board,* 123 F. (2d) 215, 224 (C. C. A. 8). Both the Board and the court below had a wide range of discretion in

[10] Petitioner filed in the court below a petition for rehearing in which, for the first time, it requested leave to adduce, in addition to the evidence which it had theretofore sought to adduce, evidence regarding alleged misconduct of the Teamsters in other industries which had occurred less than four years prior to the unfair labor practice involved in this case (4A. 259–260).

The petition for rehearing was denied (4A. 333). There was no showing that this evidence was not available earlier and petitioner cannot predicate error on new matter raised for the first time in its petition for rehearing. *Independent Wireless Telegraph Co.* v. *Radio Corporation of America,* 270 U. S. 84.

determining the scope of the inquiry (see *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, No. 73, this Term, decided January 18, 1943, p. 13) and in respect to none of the four classes of evidence was their discretion abused.

1. Regardless of whether the trial examiner was correct in ruling that the detailed contents of oral reports made to company officials concerning the discharged employees were inadmissible as unreliable hearsay, petitioner was not prejudiced by the refusal of the Board and court below to direct a new hearing for the purpose of receiving such evidence. Evidence was received to show that petitioner's officials received, discussed and relied upon such reports. The detailed contents alone were excluded. In nearly every case the person who made the report was available to petitioner as a witness to testify to the facts reported. Moreover, much of the evidence was either immaterial in the Board's view of the case or was merely cumulative proof of an undisputed fact.

Petitioner complains of the exclusion of such evidence chiefly on the issue of Chastain's discharge, asserting (Pet. 8) that it would have established that Chastain had not been a satisfactory employee, and that the company officials objected to him, had notice of his union activities on company property, and discussed and reported on his activities before discharging him. This evi-

dence was not excluded.[11] The trial examiner ruled (P. A. 412):

> I am permitting counsel for respondent to show these reports to Mr. Harrell and the executive committee, but the details will have to come in through the witnesses who made the reports.

Moreover, petitioner did show that the executive committee discussed the reports on Chastain (e. g. P. A. 415) and the Board took the evidence carefully into account (P. A. 782–783, 790–791).[12]

On the issue of the discharges of Moneymaker and Nall also, petitioner complains that it was not

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[11] Petitioner also objects (Pet. 8) to a ruling excluding a question put to Chastain as to whether the wage rates were confidential. Chastain had already testified that he had not been so instructed hence only his conclusion, which was immaterial, was called for by the question (P. A. 112). But even if the ruling was wrong, no harm was done. The Board found that it was immaterial whether Chastain had divulged the information and whether it was of a confidential nature, since other and anti-union reasons motivated his discharge (P. A. 794–795).

[12] Petitioner refers to rulings preventing its official Sopher from refreshing his recollection from a purported stenographic transcript of what occurred when Chastain was discharged (identified as R. Exhibit 124) (2A. 1117–1119). The Board admitted the transcript in evidence so that no possible prejudice resulted from the ruling (P. A. 794, n. 19).

Neither can petitioner have been harmed by the refusal of the trial examiner to permit witnesses to testify directly concerning their state of mind when Chastain was discharged (Pet. 8–9). The attitude of the company officials was sufficiently brought out in many other ways.

permitted to have its official Lippincott describe what Romine, a company "stool pigeon," had reported concerning the threats made by Moneymaker and Nall in the garage (P. A. 403–404). But Romine's written report of the incident was admitted by the Board (R. Exh. 130; 3A. 1508; P. A. 796, n. 22); and Romine testified concerning it (P. A. 457–407). A remand to receive the oral testimony by Lippincott would have been an idle gesture.[13]

In respect to the reports of violence during the strike, which petitioner contended was the reason for refusing to reinstate some of the strikers, the situation is the same. The Board received the written reports and affidavits which the trial examiner excluded (R. Exh. 31–69, 106, 131, 132, 3A. 1381–1406, 1456, 1508–1511; P. A. 808) but did not reopen the hearing to receive oral testimony, which had also been excluded (P. A. 403–404, 410–413; 1A. 312, 313, 354, 356, 358–361, 362, 407; 2A. 1122). It was, however, merely cumulative. Moreover, under settled principles on which the Board relied, proof of altercations on the picket line and of minor batteries during a strike does not

[13] The trial examiner also refused to allow direct testimony from the company officials concerning why they discharged Moneymaker and Nall (1A. 379, 407) but did receive evidence of the reasons assigned at the time of the discharge. It is plain that further avowals would have been merely cumulative and could not have affected the decision of the Board.

warrant denying relief to strikers who have been refused reinstatement in violation of the Act.[14]

2. The evidence that Local 135 had a reputation for the use of violence, based largely upon a conviction for manslaughter and civil litigation resulting from a strike four years before, was plainly inadmissible. As the court below said (4A. 256), these acts "were disgraceful and reflected seriously on the participants and even on the members of the union, who, though themselves innocent, did not eject the criminal or disorderly element * * *. But on what theory this record should be permitted to prejudice respondent's employees four years later, we cannot see."

Petitioner urges that this evidence was relevant to show why it discharged Moneymaker and Nall. But manifestly proof that some members of Local 135 had been guilty of violence would not deprive Moneymaker and Nall of their right to support Local 135 or show that they themselves were violent characters or that petitioner so believed; there was

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[14] *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9), certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *Arthur J. Colten, et al.*, 105 F. (2d) 179 (C. C. A. 6); *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3), certiorari denied, 308 U. S. 605; *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472 (C. C. A. 3), certiorari denied, on this point, 309 U. S. 684, 310 U. S. 655; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. (2d) 874 (C. C. A. 1), certiorari denied, 313 U. S. 595.

no offer to connect Moneymaker and Nall with the prior incidents.

Petitioner also offered the evidence of reputation upon the question whether it was obliged to bargain with Local 135. The evidence was immaterial on this issue for it is settled that past misconduct of a union does not excuse an employer from complying with the Act when the union offers to bargain in good faith. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2), certiorari denied, 304 U. S. 576.

3. Petitioner's offer to prove by statements of individual union members that a conspiracy existed to stop petitioner's interstate shipments by the use of violence, if necessary, was rightly refused.[15] Under Section 6 of the Norris-LaGuardia Act (47 Stat. 71, 29 U. S. C. 106), those statements, even if made, could not be charged either to the unions or to their members, for petitioner did not offer to show that the statements were authorized or ratified.[16] Furthermore, as the

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[15] The statement of petitioner (Pet. 12) that the Board followed a rule of excluding all evidence of violence unless there was a conviction in the state court is incorrect. On the contrary the Board admitted all evidence of altercations, fist fights, and other misconduct engaged in by the striking employees, as well as evidence of charges or convictions of violation of law. It gave due consideration to it (P. A. 831). The evidence, excluded as irrelevant, consisted of statements made by several union members at a joint meeting of the Teamsters and the Federal, a list of the strikers who picketed petitioner's plant during the strike, statements made

Board pointed out (P. A. 829–830), all that was offered to be proved concerning the unions or employees as a group was that the unfair discharges of Chastain, Moneymaker, and Nall caused the employees to call a strike. This was the employees' right and there was no issue in the case on which it was material that some irresponsible persons among them contemplated violations of law in the course of the strike.

The principles governing the extent to which the Board should investigate charges of violence and conspiracy among union members were recently stated in *National Labor Relations Board* v. *Indiana & Michigan Electric Co., supra.* "The Board is not required to sidetrack proceedings involving an employer's violation of the labor law while it explores irrelevant derelictions of parties or wit-

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by a union leader (not in petitioner's employ) at a hearing on legislation pending before the Indiana legislature, and testimony relative to the past history of the Teamsters,—offered by petitioner to establish an alleged violation by the Teamsters of the Sherman Anti-Trust Act and an alleged illegal conspiracy to commit acts of violence against petitioner's employees and property (P. A. 825–826, 829).

[16] See also *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 479 (C. C. A. 3), certiorari denied on this point, 309 U. S. 684, 310 U. S. 655; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6); *National Labor Relations Board* v. *Kentucky Fire Brick Co.*, 99 F. (2d) 89, 92–93 (C. C. A. 6); *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. (2d) 849, 856 (C. C. A. 7), certiorari denied, 312 U. S. 680.

nesses or acts of unknown or irresponsible persons." *Id.* p. 13. "If by that procedure [a full hearing] there is found wrong-doing on both sides, the Board can act to prevent the employer wrong-doing prohibited by the Act, even though it cannot reach other wrong-doing." *Id.* p. 14. The Board and court below correctly applied those principles in the instant case. There is no suggestion in the instant case that there was an attempt to influence the proceedings before the Board [17] or that the proffered evidence tended to impeach its findings. Any collateral wrong-doing must be remedied in another forum.

4. There is no merit to the contention that petitioner was denied a fair trial by the refusal to subpoena four witnesses who had already testified and been cross-examined at length. The only new matter which petitioner sought to elicit was the names of the members of Local 135 and Federal (P. A. 776). This information was irrelevant to any issue in the case.

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[17] The threat "to get" an employee if he should "get up there and testify on the 14th," to which petitioner refers (Pet. 14, n. 13) concerned a criminal proceeding, not the Board proceeding (3A. 1456; 2A. 986). Its contention that another person, an employee of another plant, was afraid to testify is based upon a report made to petitioner by the employer of such person and not upon any evidence of an attempt by the unions to influence the proceedings (2A. 1267).

CONCLUSION

The decision of the court below is correct and presents neither a conflict of decisions nor any question of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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